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IN THE

Supreme Court of the United States

October Term 1967

No. 1140

JERRY D. CHANEY,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Pursuant to Rule 24 of the Rules of the Supreme Court, respondents The State Bar of California, John A. Sutro, J. N. DeMeo, A. Stevens Halsted, Jr., Peter J. Crosby, Jr. and David B. Heyler, Jr. oppose the issuance of a writ of certiorari in the above entitled case for the reasons set forth in this brief.

JURISDICTION AND STATUTES INVOLVED

Petitioner correctly states the basis of this Court's jurisdiction and correctly cites the constitutional and statutory provisions applicable to the questions raised by this petition, except in the following particulars:

1. Petitioner's quotation of Section 6046 of the California Business and Professions Code is incomplete, the full text being as follows:

§ *6046.* "The board may establish an examining committee having the power:

"(a) To examine all applicants for admission to practice law.

"(b) To administer the requirements for admission to practice.

"(c) To certify to the Supreme Court for admission those applicants who fulfill the requirements provided in this chapter."

2. Petitioner does not cite nor set forth Sections 6010, 6011, 6060 and 6066 of the California Business and Professions Code, which provide in pertinent part as follows:

§ *6010.* "The State Bar is governed by a board known as the board of governors of the State Bar. The board has the powers and duties conferred by this chapter."

§ *6011.* "The board consists of fifteen members."

§ *6060.* "To be certified to the Supreme Court for admission and a license to practice law a person . . . shall:

". . .

"(b) Have passed a final bar examination given by the examining committee."

". . .

§ *6066*. "Any person refused certification to the Supreme Court for admission to practice may have the action of the board, or of any committee authorized by the board to make a determination on its behalf, pursuant to the provisions of this chapter, reviewed by the Supreme Court, in accordance with the procedure prescribed by the court."

3. Petitioner does not cite nor set forth Rule 59(b) of the Rules of Practice and Procedure of the Supreme Court of California (36 Cal.2d 43), which provides in pertinent part as follows:

"Rule 59.

" . . .

"(b) A petition to the Supreme Court to review any other action of the Board of Governors of The State Bar, or of any committee appointed by it and authorized to make a determination pursuant to the provisions of the State Bar Act, shall be filed within 60 days after written notice of the action complained of is mailed, postage prepaid, to the petitioner. . . . The petition shall be verified, shall state the grounds relied upon and shall be accompanied by petitioner's brief and proof of service on the Board of Governors of 3 copies of the petition and the brief. . . ."

STATEMENT OF THE CASE

Petitioner's statement of the case is correct (Petition, pp. 7-8).

ARGUMENT

The petition purports to raise 10 separate questions, but only five are argued. Respondents will deal with these five questions as follows:

1. Did petitioner suffer a "deprivation" of any rights, privileges or immunities secured by the Constitution or laws of the United States? (Question 5, Petition, p. 3)

2. Does the use of an essay examination in testing the qualification of applicants for admission to a state bar raise any substantial federal question? (Questions 1-4, Petition, pp. 2-3)

The remaining questions not argued by petitioner each constitute an independent ground for sustaining the judgment below and will be discussed briefly herein.

I

PETITIONER HAS SUFFERED NO "DEPRIVATION" COGNIZABLE UNDER THE CIVIL RIGHTS ACT. (Question 5, Petition, p. 3)

The Court of Appeals concluded that petitioner had suffered no "deprivation" of any right, privilege or immunity secured by the Constitution or laws of the United States within the plain language of 42 U.S.C. § 1983. The Court reasoned that because certification by the Committee of Bar Examiners is purely advisory and the California Supreme Court alone has jurisdiction to admit or refuse admission to the State Bar, a "deprivation" could occur only through the action of the California Supreme Court (386 F.2d 962, 966-7).

Petitioner argued below and contends here that the refusal of the State Bar to certify an applicant is tantamount to Supreme Court refusal because of that court's refusal to review examination results. As the Court of Appeals held, the argument not only misses the point but is without factual basis. The California Supreme Court stated in *Staley v. State Bar*, 17 Cal.2d 119, 121; 109 P.2d 667 (1941) that: "Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the court." However, it went on to state that "if any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition or coercion . . . , this court will be willing to listen to his complaint." Thus, an attack upon the examination on constitutional grounds would certainly be heard by the Supreme Court of California.

Petitioner attempts to bolster his argument here by referring to the California Supreme Court's refusal to file his "Ex Parte Motion" for admission after the decision by the Court of Appeals (Petition, Exs. A & B). The letter from the clerk of the California Supreme Court upon which petitioner relies shows on its face, however, that the court did not refuse to consider petitioner's application. Rather, the clerk courteously called petitioner's attention to the correct procedure for presenting his contentions for decision by the court.

In point of fact, petitioner had waived his right to seek review in the California Supreme Court by his failure to proceed within the 60-day time limit specified by Rule 59(b) of the Rules of Procedure and Practice of the California Supreme Court. This does not alter the fact

that until the Supreme Court has acted in his case, petitioner can suffer no "deprivation" within the cognizance of the Civil Rights Act.

The conflict of decision urged by petitioner with *Monroe v. Pape,* 365 U.S. 167; 81 S.Ct. 978; 5 L.Ed. 2d 492 (1961) and *McNeese v. Board of Education,* 373 U.S. 668; 83 S.Ct. 1433; 10 L.Ed. 2d 622 (1963), is without substance. The holding of *Monroe* was that the mere fact that a state by its Constitution and laws outlawed unreasonable searches and seizure was no barrier to a suit under the Civil Rights Act based upon unreasonable search and seizure. In *McNeese,* this Court reversed the lower court holdings that plaintiffs must exhaust an administrative remedy provided under state law before maintaining a Civil Rights Act suit, emphasizing the "tenuous protection" afforded by an administrative remedy of doubtful adequacy accompanied by a clearly inadequate sanction.

As pointed out by the Court of Appeals those cases have no application to the instant case because there has been no "deprivation" of any kind until and unless the California Supreme Court expressly or impliedly approved the refusal to certify petitioner for admission to practice (386 F.2d 962, 966-7). Moreover, the provision of a direct and immediate review by the California Supreme Court of a refusal to certify is not a "tenuous" remedy and ought not to be disregarded. As this Court has observed, lawyers are subject to the "autonomous control" of the state and "state courts should be given the opportunity to regulate and vindicate that control" *Theard v. United States,* 354 U.S. 278, 281; 77 S.Ct. 1274, 1 L.Ed. 2d 1342 (1957).

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED. (Questions 1, 2, 3 and 4, Petition, pp. 2-3)

Upon analysis the petition raises only two arguments in support of petitioner's position that a substantial federal question is presented. First, it is contended that the essay format used in the California bar examinations is necessarily arbitrary in result and, thereby, those who fail such examinations are denied due process of law (Questions 1, 2 and 3, Petition, p. 2). Second, it is contended that the sole function of the bar examination is to restrict competition among attorneys in California, thus unconstitutionally discriminating against unsuccessful applicants (Question 4, Petition, pp. 2-3). Neither of these arguments have any substance.

Both arguments are based upon a claim of conflict with this court's decision in *Louisiana v. United States,* 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed. 2d 709 (1965). There Louisiana adopted a requirement that persons seeking to register to vote demonstrate to the satisfaction of the registrar an understanding and reasonable interpretation of the state or federal constitutions. Whether one passed this "interpretation test" was subject to the uncontrolled discretion of the registrar. The record abounded with evidence that the test was designed and utilized for the express purpose of excluding Negroes from the voting rolls. In brief, the test was being systematically used to deprive a class of citizens of a constitutional right without regard for their qualification to vote. The decision did not purport to prohibit all types of essay examinations and certainly did not hold that

all lawyers must be admitted to practice regardless of their qualifications.

Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 238-239, 77 Sup.Ct. 752, 1 L.Ed. 2d 796 (1957), defines the extent of federal concern as to the right to be admitted to practice law in a state:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. * * * A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. * * * Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

Louisiana v. United States, supra, does not hold to the contrary.

A. An Essay Type Bar Examination Is a Rational Method of Testing Proficiency at the Law.

The Court of Appeals held:

> "Within the recognition contained in *Schware* of the right of a State to require high standards of relevant qualification for admission to its bar, and in relation to the condition thereof that any such required qualification must however have 'a ra-

tional connection with the applicant's fitness or capacity to practice law', we are unable to see any possible federal question in the fact of the use by California of the essay-type examination as such. To us it seems patent on its face that California has the right to allow its Committee of Bar Examiners to use such a type of examination in demonstration by those seeking admission to its bar, as a qualification standard, that they have the capacity to analyze general legal situations and to make application thereto of such general legal knowledge as can be expected to be possessed by the graduates of accredited law schools. The existence of this qualification certainly has a rational connection with the capacity to practice law, for it inherently is the primary basis of general legal service. And of course there also is involved in such an essay examination an indication as to the possession or lack of knowledge in the legal fields to which the questions relate."

As the Court of Appeals noted:

"Appellant does not purport to claim . . . that there was no basis for the Committee of Bar Examiners' finding that he failed to pass the examinations taken by him. Nor does he purport to claim that the Committee was without basis to find that those whom it certified to the Supreme Court for admission had passed the examinations so as to involve invidiously discriminatory action with respect to him." 386 F.2d 962, 964

Thus, petitioner's claim of a substantial federal question is restricted to the argument that (1) an essay type bar

examination is not a rational method of testing his proficiency at the law, and (2) the California bar examinations are "invidiously discriminatory" because they have been used to restrict competition among lawyers. Neither argument is supportable.

The error underlying petitioner's attack on this holding is in the unfounded conclusion that because the California bar examination uses an essay format, the evaluation thereof is necessarily "based wholly on the grader's subjective (thus arbitrary) view of how well . . . the (examinee) could 'reason logically in a lawyer-like manner to sound conclusions. . . .'" In actuality, an essay discussing the application of legal principles to a given set of facts is capable of objective evaluation. As observed by the Court of Appeals, the essay type of examination is the type recommended by the American Bar Association and generally employed in the law schools of the country. Most lawyers would concede the superiority of essay type examinations in testing proficiency at the law. But whether or not they are in fact superior, they are a reasonable and rational method for such testing and do not violate due process.

B. The California Bar Examinations Are Not Invidiously Discriminatory.

On this point, petitioner claims that the holding of the Court of Appeals conflicts with *Louisiana v. United States*, supra, because:

> "The only difference in that case and the instant case is that color was the basis for discrimination in the former case, while numbers is the basis for

discrimination in the latter." (Petition, Appendix II, p. iii)

The petition further states:

> "Your petitioner maintains the examinations of which he complains achieve nothing other than they reduce the number of successful applicants for admission, and this accomplishment, standing alone, is discriminatory; thus not a proper state purpose." (Petition, p. 12)

These arguments are not well founded either logically or factually.

Obviously, requiring high standards of proficiency at the law of applicants for admission to practice is a proper state purpose. (*Schware v. Board of Bar Examiners of State of New Mexico, supra.*) And insistence upon such high standards will necessarily limit the number of persons admitted to practice. But petitioner avers that "In 30 consecutive bar examinations only 50.7 per cent passed the spring examinations and only 53.5 per cent passed the fall examinations. . . . Only slightly over 42 per cent passed the March 1966 examination." (Record, p. 10) and insists that these figures show that "Each of said examinations was part of a deliberate and invidious scheme of the State Bar . . . to control competition among attorneys of the State" (Record, p. 4). Of course, these figures show no such thing. Standing alone, they indicate only that California is exercising its right to establish and maintain high standards of proficiency at the law.

The Court of Appeals recognized that a claim for relief might be stated if it was shown that in order to

restrict competition the Committee of Bar Examiners (1) has been engaging is dishonest grading, or (2) has been giving examinations of such scope or difficulty as to be outside the bounds of educational prescriptions which the California Statute has made the basis for the right to take the examination.

Petitioner has never contended that such conditions exist. His allegation that the bar examinations have been used as part of a "deliberate and invidious scheme of the State Bar of California to control competition among attorneys of the state" (Record, p. 4), is a mere conclusion of law which is not entitled to weight *Saier v. State Bar of Michigan,* 293 F.2d 756, 761 (6th Cir. 1961). Petitioner does not contend that the Committee of Bar Examiners had engaged in dishonest grading (Petition, p. 4). Even if petitioner had alleged that the bar exam exceeded the permissible scope of difficulty, in view of the fact that approximately 50% of all applicants have passed the last 30 examinations such an allegation would be entitled to no weight. Petitioner alleged no facts showing or tending to show discrimination except on the basis of proficiency at the law.

III

THE STATE BAR IS NOT A "PERSON" WITHIN THE MEANING OF THE CIVIL RIGHTS ACT.

One of the grounds for dismissal in the District Court was that the State Bar of California is not a "person" within the meaning of the Civil Rights Act, and hence not subject to suit under that statute. This question was not reached in the opinion of the Court of Appeals. How-

ever, the District Court was correct in holding that the State Bar of California is not a "person" within the meaning of the Civil Rights Act.

In enacting the Civil Rights Act, Congress decided not to impose obligations upon a "mere instrumentality for the administration of state law." *Monroe v. Pape,* 365 U.S. 167, 190; 81 S.Ct. 473; 5 L.Ed. 2d 492 (1961). It has been expressly held that an integrated state bar association is an agency of the state to which this construction of the statute is applicable. *Clark v. State of Washington,* 366 F.2d 678, 681 (9th Cir. 1966).

Petitioner's only argument to the contrary has been that the governmental instrument exception should not apply because the State Bar is not a tax supported agency (Record, p. 56; Appellant's Brief, p. 22). This attempted distinction is not material to the purpose of the legislative exemption for governmental instrumentalities. Whether supported by taxes from the general fund, from special funds, by special assessments, or by dues exacted from its members to finance its public functions, it remains the unalterable fact that the State Bar of California is an instrumentality for the administration of state law.

IV

THE STATE BAR AND ITS OFFICERS HAVE QUASI-JUDICIAL IMMUNITY FROM SUIT UNDER THE CIVIL RIGHTS ACT. (Question 9, Petition, p. 3)

Judicial and quasi-judicial officers are immune from suit under the Civil Rights Act for acts committed in the performance of an integral part of the judicial process.

This point was not reached by either the Court of Appeals or the District Court but is an independent ground sustaining the judgment below.

Quasi-judicial immunity has been recognized in a wide variety of situations. Specifically it has been held that such immunity applies to officers of an integrated state bar association with respect to the discharge of their functions in connection with the qualification and disqualification of attorneys. *Clark v. State of Washington, supra,* 681; *Rhodes v. Meyer,* 334 F.2d 709 (8th Cir. 1964), cert.den. 379 U.S. 915 (1964); *Campbell v. Washington State Bar Assoc.,* 263 F.Supp. 991 (W.D. Wash. 1967).

Petitioner has argued that because no judicial authority has been delegated to the State Bar or its Committee of Bar Examiners, it cannot have quasi-judicial immunity (Record, p. 55, Appellant's Brief, p. 23). The defect of this argument is the assumption that it is necessary for an act to be an exercise of judicial authority to be entitled to quasi-judicial immunity. To the contrary, any act which is an integral part of the judicial process, necessary for the courts to carry out their judicial functions, is protected by quasi-judicial immunity. Thus, it has been held that quasi-judicial immunity applies to the acts of grand juries and their foremen, *Cawley v. Warren,* 216 F.2d 74 (7th Cir. 1954); *Lyons v. Baker,* 180 F.2d 893 (5th Cir. 1950), cert.den. 340 U.S. 828 (1950) and to doctors appointed by the court to inquire into a person's mental condition for the purpose of advising the court thereon. *Duzynski v. Nosal,* 324 F.2d 924 (7th Cir. 1963); *Bartlett v. Weimer,* 268 F.2d 860 (7th Cir.

1959), cert.den. 361 U.S. 938 (1960). In none of these cases did the acts in question involve an exercise of judicial authority.

V

AN INJUNCTION AGAINST RESPONDENTS COULD NOT HAVE BEEN EFFECTIVE TO SECURE THE RELIEF SOUGHT. (Question 10, Petition, p. 3).

In view of the paramount authority of the California Supreme Court with regard to admission to the State Bar, an injunction granting relief along the lines sought by petitioner would have to be enforceable against the California Supreme Court. The District Court, however, had no power to issue such an injunction. *Clark v. State of Washington, supra,* 681-682; *Campbell v. Washington State Bar Assoc., supra.*

VI

THE MATTERS COMPLAINED OF ARE REVIEWABLE BY THIS COURT ONLY ON A PETITION FOR CERTIORARI AFTER REVIEW IN THE CALIFORNIA SUPREME COURT (Question 6, Petition, p. 3).

The District Court's judgment of dismissal was in part based on the conclusion that the matters of which petitioner complains are reviewable only by the California Supreme Court and thereafter by this Court on petition for certiorari. This decision was correct, in light of the recent decisions of this Court or a growing number of cases from the lower Federal courts.

The origin of this rule is this Court's discussion of the diversion of constitutional authority between the state and Federal courts with respect to the regulation of attorneys in *Theard v. United States,* 354 U.S. 278; 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957). The court there stated:

> "It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in *Konigsberg v. California,* 353 U.S. 252, and *Schware v. Board of Bar Examiners,* 353 U.S. 232, to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. *The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included . . . .*" 354 U.S. 278, 281 (Emphasis supplied)

The teaching of *Theard* was followed in *Gately v. Sutton,* 310 F.2d 107 (10th Cir. 1962), an action in which it was alleged that a disbarment proceeding in the Supreme Court of Colorado created a cause of action under the Civil Rights Act.

> " 'The federal courts do not have jurisdiction to review an order of the Colorado Court disbarring an attorney in that state for personal and professional misconduct. * * * The limits of [federal] review * * * are violations, in the course of disbar-

ment proceedings, of the due process or equal protection clauses of the Fourteenth Amendment, and *a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which review may be had.*'" 310 F.2d 107, 108 (emphasis supplied, citations omitted)

See also: *Jones v. Hulse,* 267 F.Supp. 37, 39 (E.D. Mo. 1967);

Lenske v. Sercomb, 266 F.Supp. 609, 612 (D.Ore. 1967).

Clark v. State of Washington, 366 F.2d 678, 680-681 (9th Cir. 1966);

Cf. Wright v. McMann, 257 F. Supp. 739, 746 (N.D.N.Y. 1966);

United States ex rel Wakely v. Commonwealth of Pennsylvania, 247 F.Supp. 7 (E.D.Pa. 1965).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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